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Supreme Court of the United States

OCTOBER TERM, 1965

No. 1304

BORRIS M. KOMAR, 349 East 49th Street, New York 17, N. Y.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, Office of Corporation Counsel, Municipal Building, Chambers Street, New York 7, N. Y.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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212—MU 8—3521

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Borris M. Komar, a member of the Bar of this Honorable Court for over forty years, respectfully requests that a writ of certiorari issue to review an order of said Court of Appeals of the State of New York affirming solely on alleged state procedural ground the dismissal of petitioner's application *coram nobis* to vacate a judgment of criminal conviction as procured by the prosecution by tender of known perjured testimony contrary to due process of law prescribed by the Fourteenth Amendment to the United States Constitution.

Opinions Below

No opinions were rendered in this case by the appellate state courts, but an opinion was rendered by the Criminal Court of the City of New York, where the *coram nobis* proceeding originated (R. p. 17). Under the express provisions of the New York Civil Practice Rules and Law governing the appeals, Rule 5522, if the appellate courts do not write opinions they are deemed not to have modified or reversed the opinion of the court appealed from.

Jurisdiction

The Court of Appeals affirmed the order dismissing the *coram nobis* proceeding (Mr. Justice John Van Voorhis dissenting and voting for reversal) on December 24, 1965 (16 N. Y. (2) 993), and an application for reargument was duly and timely made and denied on January 6, 1966. By an order of March 29, 1966, Hon. John M. Harlan, associate Justice of this Honorable Court extended the time of the petitioner to file his petition for certiorari to and including May 16, 1966. The jurisdiction of this Honorable Court is invoked by 28 U. S. C. A. Judiciary Code, Section 1257, subd. 3.

Question Presented

This case presents the question left expressely undecided by this Honorable Court in *Henry* v. *Mississippi*, 379 U. S. 443, namely, whether the state court may deny to a citizen accused of crime the guarantee of due process of law prescribed by the Fourteenth Amendment to the United States Constitution solely on the ground of adequate state procedural ground. No question of total or selective application of any Amendments comprising the Bill of Rights is involved, but a direct question of due process by prosecutor's tender of known perjured testimony on the

controlling question in the case and the withholding of exculpating written proof held by the prosecutor. No question of fact is involved as no hearings were held on the petition for *coram nobis,* and it was dismissed solely as a matter of law.

Statement

Petitioner inherited a vacant one-story brownstone building at 166 West 94th Street, New York City. The lodgers in adjoining boarding houses on each side of it threw garbage into the yard and the front areaway. Every two months petitioner hired a garbage truck to remove the garbage, the last time on November 10, 1958 (R. p. 9).

On December 12, 1958, Leroy J. Walker, purchased the house and took full possession of it. Walker then formed and paid all the fees of a New York corporation under the name of Amcol Residences, Inc. Walker took title to the house in the corporate name on January 8, 1959, and on the same day executed as Vice-President a mortgage and a bond to petitioner. All documents were notarized on January 8, 1959 (R. p. 9).

Petitioner was charged with the violation of Sections 53 and 183 of the Sanitary Code of the City of New York dealing with garbage nuisance as of February 26, 1959. The sole defense and the sole question tried was whether on February 26, 1959 the petitioner had title to said brownstone (R. p. 9). In New York delivery of deed without filing or registration anywhere transfers title (*Lea* v. *Beagell,* 174 Misc. 6; 19 N. Y. Supp. (2) 613). Walker was the sole stockholder, officer and director of Amcol Residences, Inc. Petitioner as mere mortgagee, not in possession, was not responsible under New York law for the condition of the said brownstone (*Gardner* v. *1111 Corporation,* 268 App. Div. 110; 141 N. Y. Supp. (2) 552, aff'md 1 N. Y. (2) 758).